

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DONALD E. KIEHL</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 217,855
<b>ALLIED GROUP INSURANCE</b>	)	
Respondent	)	
AND	)	
	)	
<b>CIGNA PROPERTY &amp; CASUALTY INS.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier appealed from a February 14, 1997, preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

**ISSUES**

The Administrative Law Judge granted claimant's request for preliminary benefits which included authorized medical treatment for his left shoulder injury and, if claimant is taken off work, temporary total compensation. In its Application for Review by Workers Compensation Board, respondent and its insurance carrier (hereinafter respondent) alleged "that the Administrative Law Judge exceeded his jurisdiction in granting the relief requested at the preliminary hearing and committed error regarding the following specific issues which were disputed at the preliminary hearing:

- "1. Regarding the claimant's alleged accident on August 24, 1994, whether the claimant sustained accidental injury arising out of and in the course of his employment.

- “2. Regarding the claimant’s alleged accident on August 24, 1994, whether the claimant served timely written claim pursuant to K.S.A. 44-520a.
- “3. Regarding the claimant’s alleged accident in October of 1996, whether the claimant sustained accidental injury arising out of and in the course of his employment.
- “4. Regarding the claimant’s alleged accident in October of 1996, whether the claimant provided timely notice to the respondent pursuant to K.S.A. 44-520.”

In the Brief of Respondent and Insurance Carrier it was specifically noted that although respondent raised four issues in its Application for Review, only the issues of notice and written claim would be briefed. Nevertheless, respondent wanted the Appeals Board to address all four issues.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

A recitation of the pertinent factual history of this claim is set forth in the Brief of Claimant as follows:

“The claimant, Donald Eugene Kiehl, is a 66 year-old claims adjustor for the respondent, Allied Group Insurance. His official title is ‘Senior Physical Damage Appraiser’ (transcript of preliminary hearing hereinafter identified as P.H., pg. 5-6). In August, 1994, the claimant was inspecting a wrecked automobile which had been insured by respondent and was otherwise performing his duties in connection with his employment. While inspecting the vehicle, he tripped over some weeds adjacent to the automobile, slipped, fell, and caught himself with his left hand on the side of the vehicle, somewhat breaking his fall. Claimant immediately felt pain in his left shoulder and also his left knee (P.H., pgs. 6-7). Claimant testified that he had previously had arthroscopic surgery done on the left knee in 1987, which was not job related, but had never had any problems with his left shoulder. Following the arthroscopic surgery to the left knee in 1987, claimant had absolutely no problem with the knee after that, until the injury at work in August, 1994 (P.H., pg. 7).

“Claimant reported the accident in August, 1994 to the respondent’s human resource director, Gretchen Cowling, who was the person authorized to accept reports of injury. That report occurred within ten days of the accident (P.H., pgs. 7-8). Thereafter, on September 13, 1994, claimant sought treatment with Dr. David Thurston, an orthopedic surgeon located in Topeka. On examination, Dr. Thurston diagnosed ‘degenerative changes of

the knee with new strain.’ Concerning the left shoulder, Dr. Thurston found ‘pretty fair range of motion’ with some degenerative changes in the shoulder (P.H., Respondent’s Ex. 1).

“Following this examination by Dr. Thurston, claimant decided to forego any treatment to the knee or shoulder. Claimant does not dispute that he did not make written claim made [sic] within 200 days following the accident on August 24, 1994. However, in September, 1996, claimant’s knee condition had deteriorated to the extent that he desired to be examined again by Dr. Thurston. Claimant contacted Gretchen Cowling, the human resources director at respondent, requesting further treatment with Dr. Thurston. Ms. Cowling did not give the claimant an answer on that day, but eventually, she contacted Mr. Kiehl, and informed him that further treatment for the knee with Dr. Thurston was authorized. Further, the claims adjustor from Cigna, Lisa Wagner, called the claimant and authorized arthroscopic surgery with Dr. Thurston for October 2, 1996 (P.H., pgs. 10-11).

“Mr. Kiehl underwent arthroscopic surgery on October 2, 1996, and was off work for several weeks thereafter. During this period of time, he was paid temporary total disability benefits by the respondent’s insurance carrier, Cigna, in the amount of \$319.00 per week (P.H., pg. 12). Furthermore, following the surgery, claimant was required by Dr. Thurston to use crutches while recuperating. Mr. Kiehl testified that he walked out of Dr. Thurston’s office on October 2, 1996 with crutches, and continued to use the crutches until he again saw the doctor on October 11, 1996. Claimant testified that during the period of recuperation of his knee surgery, while using the crutches and putting weight on his shoulders with the crutches, he experienced ‘severe pain in my shoulder joint,’ referring to the left shoulder (P.H., pgs. 12-13). Furthermore, the claimant testified that he may have contracted Gretchen Cowling, of Allied Mutual Insurance, the same day that he saw Dr. Thurston on October 11, 1996, and ‘definitely’ within ten days of that date (P.H., pgs. 14-15). The clinical notes from Dr. Thurston’s records show that the claimant reported to him problems with the shoulder on October 11, 1996.” Brief of Claimant at 2-4.

1. Whether claimant’s alleged August 24, 1994 and October 1996 accidental injuries arose out of and in the course of his employment with respondent.

Although the parties have litigated these claims under one docket number, the parties present separate arguments according to the date of accident concerning both notice and written claim. On appeal, respondent separated its issues of notice and written claim by accident date, with the notice issue being for the October 1996 accident and the written claim issue pertaining to the August 24, 1984 accident. Therefore the Appeals

Board understands the issues raised by respondent concerning whether claimant has proven his injuries were the result of accidents which arose out of and in the course of his employment to be whether claimant met his burden of proving his injuries are work related, as opposed to whether claimant's injuries are the result of one accident or two. Thus, even though the parties have litigated these claims under one docket number it involves two separate accidents.

The uncontradicted testimony is that claimant suffered a work-related injury to his left shoulder and left knee on August 24, 1994 as alleged. It is likewise uncontradicted that the October 1996 aggravation to claimant's left shoulder injury was from his use of crutches while recovering from his authorized left knee surgery. In a workers compensation case, if evidence is presented that it is uncontradicted and it is not improbable, unreasonable, or shown to be untrustworthy, the fact finder cannot disregard that evidence. Uncontradicted evidence is generally regarded as conclusive. See Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978). Accordingly, the Appeals Board finds claimant sustained personal injury by accident to his left shoulder and left knee on August 24, 1994 and an aggravation to his injured left shoulder in October 1996 and that both injuries arose out of and in the course of his employment with the respondent.

2. Whether claimant gave timely notice of the October 1996 aggravation of the left shoulder injury.

Claimant alleges he initially injured his left shoulder in the August 24, 1994 accident. On October 2, 1996, claimant underwent arthroscopic surgery on his left knee. Thereafter, he was required to use crutches. David E. Thurston, M.D., was the orthopedic surgeon authorized by respondent to treat claimant's August 24, 1994 left knee and left shoulder injuries. Dr. Thurston performed the October 2, 1996 surgery on claimant's left knee. Thereafter, he saw claimant for a follow-up appointment at his office on October 4, 1996. Dr. Thurston's office notes for that date reflect that at that time claimant was still "not well enough to be off his crutches yet." Claimant was instructed to return in one week which he did on October 11, 1996. On that date Dr. Thurston noted that claimant was "still having some soreness. He is limping just a little bit, but he is not using crutches today." Dr. Thurston's office notes also contain the following:

"The patient also indicated that when he was originally seen, he had hurt his left shoulder in this injury and that I had told him there was the possibility of an arthroscopy to evaluate it. He wants to look into that. He said I told him that I would send him to someone doing shoulder arthroscopy for evaluation. I didn't examine his shoulder or go into the details of the history, but I have suggested that he see Dr. Vosburgh for his evaluation regarding the shoulder problem."

This office note by Dr. Thurston, as with all of his chart entries, shows a copy was sent to the adjuster for the respondent's workers compensation insurance carrier. The adjuster for Cigna identified in Dr. Thurston's notes as the person to whose attention his records were sent was Lisa Wagner. Ms. Wagner did not testify at the preliminary hearing and the record does not otherwise reflect when Cigna received Dr. Thurston's October 11, 1996 office notes. Claimant was in fact referred by the authorized treating physician to Dr. Craig L. Vosburgh who ultimately did perform arthroscopic surgery to repair a torn left rotator cuff in claimant's left shoulder. Dr. Vosburgh's office notes reflect that when he initially examined claimant on October 17, 1996, he gave a history of left shoulder injury with a subsequent aggravation consistent with the history given to Dr. Thurston. Also, it is noted that when claimant was first seen by Dr. Thurston on September 13, 1994, claimant reported injuring both his left knee and left shoulder in the work-related accident.

Respondent admits receiving timely notice of the August 24, 1994 accident. However, in its brief respondent contends:

“. . . Claimant did not provide timely notice of the alleged left shoulder aggravation due to the use of crutches . . . .” (Brief of Respondent and Insurance Carrier at 5.)

Clearly, the insurance carrier received notice by way of Dr. Thurston's and Dr. Vosburgh's office notes that claimant had reported suffering an aggravation of his left shoulder injury as a direct result of the authorized medical treatment he was receiving for the work-related left knee injury. The record does not reflect when Dr. Thurston's October 11, 1996 or Dr. Vosburgh's October 17, 1996 office notes were received by the insurance carrier. As Dr. Thurston's records reflect, the claimant was using his crutches when he was seen on October 4, 1996 but had essentially discontinued their use on or by October 11, 1996. In the absence of any specific testimony as to when claimant completely discontinued the use of his crutches, it seems appropriate to use the date of October 11, 1996 as the date of accident.

There is conflicting testimony as to when claimant personally notified respondent of his left shoulder aggravation in October 1996 from the use of the crutches. At one point claimant testified that he may have contacted Gretchen Cowling, the Human Resources Director for respondent, on the same day that he saw Dr. Thurston, October 11, 1996. If not on that date, claimant contends he definitely contacted respondent within 10 days of that date. However, on another occasion claimant indicated that he made a phone call to respondent sometime before October 28, 1996, but that he did not specifically recall when he called. The Administrative Law Judge held that if respondent did not receive notice within 10 days that there was just cause for not getting such notice because claimant had significant preexisting shoulder problems and did not realize at the time that the use of the crutches had resulted in additional injury to his shoulder. According to claimant, he did relate the aggravation of his left shoulder symptoms to his use of the crutches on

October 11, 1996. Dr. Thurston's office notes for that date mentions only the original left shoulder injury and recommends a referral to Dr. Vosburgh for an evaluation of the left shoulder problem. The Appeals Board agrees with the Administrative Law Judge that the record supports a finding of just cause based upon a delay in claimant relating the aggravation of his left shoulder symptoms to a new work-related injury. The medical records support a conclusion that more probably than not the insurance carrier had notice of the ongoing left shoulder symptoms from Dr. Thurston's and Dr. Vosburgh's office notes within 10 days of this accident and Dr. Vosburgh's November 13, 1996 record relates an aggravation of those symptoms to the use of crutches following the knee surgery. Notice to the workers compensation insurance carrier satisfies the statutory requirement for notice to the employer.

3. Whether claimant served timely written claim for the August 24, 1994 accident.

K.S.A. 44-520a(a) provides:

"No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation . . ."

Respondent authorized medical treatment with Dr. Thurston for the injuries sustained in the August 24, 1994 accident. However, after his September 13, 1994 examination, claimant did not again obtain treatment with Dr. Thurston until September 20, 1996. Claimant served a Form K-WC 15 Claim for Workers Compensation upon the employer by certified mail on October 28, 1996.

The October 28, 1996 Claim for Workers Compensation form was obviously beyond 200 days of the August 24, 1994 accident. Claimant argues that written claim was served within 200 days of the last payment of compensation. Claimant's return to Dr. Thurston in September of 1996 and his subsequent authorized treatment would appear to support claimant's argument in this regard. However, respondent cites the case of Rutledge v. Sandlin, 181 Kan. 369, 310 P. 2d 950 (1957) for the proposition that respondent's furnishing of medical treatment to claimant following the expiration of the time period for serving written claim did not revive claimant's time for filing written claim. In Rutledge, the Court held that once the time for written claim had lapsed, the claimant's right to serve written claim is not revived by respondent's subsequent payment of compensation or furnishing of medical treatment.

Claimant relies upon the case Blake v. Hutchinson Manufacturing Co., 213 Kan. 511, 516 P.2d 1008 (1973). However, in Blake, the claimant was receiving ongoing treatment. Although respondent stopped paying for the treatment, the Court found that the claimant could easily assume that the treatment he was receiving was authorized. Accordingly, the time for timely written claim was found to have been extended for ongoing treatment. However, unlike in this case, the claimant in Blake did not terminate medical treatment or delay obtaining additional treatment for more than 200 days. Although, in this case respondent never notified claimant that further treatment with Dr. Thurston was no longer authorized, the claimant failed to return to Dr. Thurston for over a year and therefore may not have had an expectation of authorization for an ongoing course of treatment. Although respondent authorized and paid for claimant's return to Dr. Thurston, respondent contends this did not revive the 200-day time period for filing written claim. If not, claimant's claim for the August 24, 1994 accident would be time barred.

The issue of timely written claim for the August 24, 1994 accident need not be reached in order to decide this appeal. The February 12, 1997 preliminary hearing was held pursuant to claimant's application for preliminary benefits pertaining to only the left shoulder injury. It is claimant's position the need for treatment to his left shoulder and, if taken off work, temporary total disability is the result of the October 1996 aggravation to his left shoulder injury. Since claimant's request does not arise out of the August 24, 1994 accident, the issue concerning the timeliness of written claim for the 1994 accident was not before the Administrative Law Judge and is not before the Appeals Board. Respondent does not contend that the written claim for the October 1996 injury was not timely filed. Accordingly, there is no written claim issue that arises from the Administrative Law Judge's Order of February 14, 1997.

**WHEREFORE**, it is the finding, decision and order of the Appeals Board finds that the Order by Administrative Law Judge Bryce D. Benedict dated February 14, 1997, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1997.

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BOARD MEMBER

c: Paul D. Post, Topeka, KS  
Gary R. Terrill, Overland Park, KS  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director